

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**



**ORIGINAL**  
**74-1465**

To be argued by  
ROBERT ULLMAN

In The  
**United States Court of Appeals**  
For The Second Circuit

AMERICAN IMAGE CORPORATION,

*Plaintiff-Appellant,*

vs.

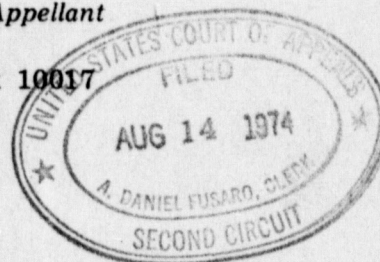
UNITED STATES POSTAL SERVICE and JOHN R.  
STRACHAN, POSTMASTER, NEW YORK, NEW YORK,

*Defendants-Appellees.*

*On Appeal from the United States District Court  
for the Southern District of New York.*

**REPLY BRIEF FOR PLAINTIFF-APPELLANT**

BASS & ULLMAN  
*Attorneys for Plaintiff-Appellant*  
747 Third Avenue  
New York, New York 10017  
(212) 751-9494



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UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 74-1465

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AMERICAN IMAGE CORPORATION, 276 Park Avenue  
South, New York, New York,

Plaintiff-Appellant,

-against-

UNITED STATES POSTAL SERVICE and JOHN R.  
STRACHAN, Postmaster, New York, New York,

Defendants-Appellees.

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REPLY BRIEF FOR PLAINTIFF-APPELLANT

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Plaintiff-appellant respectfully submits this reply  
to the brief of defendants-appellants.

A. APPELLEES TOTALLY MISCONSTRUE THE PURPOSE AND  
INTENT OF THE RIDER TO THE COMPROMISE AGREEMENT

The government would make it appear that the "Rider"  
to the Compromise Agreement was no more than a mere appendage  
to that agreement to cover a situation for people who might  
want a refund after responding to appellant's old advertise-  
ment. Other than that, appellees would put the "Rider" aside

from what the agreement was that the parties entered into in this case. This is the furthest from the fact.

The "Rider" herein was not intended as some artifice for the handling of refunds and nothing else. Rather, the Rider was an integral and important part of the agreement in the following respects:

1. There was no intent or agreement to stop the sale of the product. It was clearly contemplated that the product would continue to be sold.

2. The "Rider" clearly sets forth the intent of the parties that only certain specific claims were being prevented. The rider clearly spells out what was intended to be prohibited - i.e., claims that the product would reverse the natural aging process and would remove or eradicate lines or wrinkles due to aging.

3. Other claims in appellant's old advertisement were not being prohibited - i.e., that the product will lubricate and moisturize dry skin and give a fresh, youthful appearance, and for such purposes appellant's product was a unique or different formulation.

It is respectfully submitted that appellees' suggestion at the top of page 13 of their brief that the Rider was not intended to modify the Compromise Agreement and "on its face does not relate to future advertisements," \*/ is absurd.

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\*/ See footnote at page 12 of appellees' brief.

Surely, appellees would not contend that they would allow orders in response to the old advertisement to be filled even though all claims in that advertisement were charged to be false. Yet the claims in appellant's new advertisement, which are said to violate the Compromise Agreement, are the claims which were not prohibited in the Rider. Appellant was not required to disclaim any representation other than those pertaining to rejuvenation and elimination of wrinkles. Clearly, this is where the error of the government lies. Obviously, the Rider does relate to future advertisements in that it clarifies what really are the prohibited claims - the claims which appellant is to state are not so before filling orders in response to the old advertisement.

B. APPELLEES' BRIEF IGNORES THE INTENT OF THE AGREEMENT BETWEEN THE PARTIES

Appellant agrees with the statement at page 7 of appellees' brief that the substantive question facing the District Court was whether the second advertisement breached the Compromise Agreement. But, to understand whether the agreement was violated requires a consideration of what the agreement was between the parties.

As already discussed, the agreement herein was that this cosmetic product would continue to be sold and that certain

claims, as analyzed in the Rider, would not be made. Beyond that, however, the agreement did not contemplate an alteration of what constitutes the whole area of cosmetic advertising in the United States today. In this regard, it is respectfully submitted that the Court can take judicial notice of what constitutes the real world of cosmetic advertising for softer, smoother, younger looking skin. Thus, in considering the word "rejuvenation" referred to at page 10 of appellees' brief, we are dealing not with a matter of mere dictionary definitions, but with a very important issue of what "rejuvenate" represents as distinguished from general cosmetic references to smoother, younger looking skin which have been made for over fifty years.

In entering into the Compromise Agreement, appellant agreed that "rejuvenate" represents something significantly more than a softer, smoother, younger looking complexion. As noted at the top of page 4 of appellees' brief, appellant agreed to discontinue the representations described in the complaint. The representations described in the complaint were those described in paragraphs 3(a) and 3(b) dealing with rejuvenation and the elimination of wrinkles (JA 10a-11a). Considering the references to a trial made at pages 16-17 of appellees' brief, appellant does not believe that a trial is

necessary to determine that those are the representations the parties agreed would be terminated. Appellant does not believe a trial is necessary to determine that the parties agreed that the product could continue to be sold without any prohibition against general cosmetic claims. Nor did appellant believe that a trial was necessary to establish the difference between the meaning of the specific representations it agreed to discontinue as set forth in the administrative complaint and those general cosmetic representations not included in the Compromise Agreement which contemplated the future sale of appellant's product.

**C. THE CHANGES IN APPELLANT'S NEW ADVERTISEMENT ARE MATERIAL IN TERMS OF THE ALLEGATIONS OF THE ADMINISTRATIVE COMPLAINT.**

At the bottom of page 13 and at pages 9-10 of their brief, appellees incorrectly argue that the proper interpretation of the Agreement between the parties must be based on a comparison between appellant's first and second advertisements. As already noted, the Compromise Agreement clearly states that the representations to be discontinued are those set forth in the administrative complaint. Appellees recognize this to be the fact at the top of page 4 of their brief.

It is respectfully submitted, therefore, that the

comparison that must be made is between appellant's new advertisement and the allegations of paragraphs 3(a) and 3(b) of the Postal Service Complaint. On the basis of such a comparison, it is submitted that we are not dealing with the "fine-spun distinctions" and various levels of sophistication referred to at pages 8-9 of appellees' brief. Whether, in some respects, appellant's two advertisements look alike is immaterial. The basic fact is that in accordance with the agreement between the parties, appellant removed the representations dealing with rejuvenation and elimination of wrinkles. It is submitted that the "average reader", to whom appellees refer as the standard, will not find claims of rejuvenation or elimination of wrinkles due to aging in appellant's new advertisement. Rather, the average reader will find general cosmetic representations for softer, smoother, younger looking skin - representations which the average reader recognizes as being made by the entire industry, and representations which were not intended to be prohibited by the Compromise Agreement which contemplated the continued sale of appellant's product.

D. THE SEVERE REMEDY IMPOSED FOR BREACH OF A  
COMPROMISE AGREEMENT REQUIRES A STRICT  
STANDARD OF CONSTRUCTION FOR SUCH AGREEMENTS

At page 14 of their brief, appellees suggest that the impact of a Compromise Agreement is less than that of an "order" because it is an agreement and not an order. This is a distinction without a difference and begs the issue. Just as a violation of an FTC order, whether by a consent agreement or after a litigated hearing, leads to a civil penalty proceeding, a breach of a compromise agreement leads to a mail stop order as would a continuation of representations found false after a litigated Postal Service hearing.

The statement at page 14 of appellees' brief that Postal Service regulations do not provide for a review procedure likewise begs the issue. Nothing prevents the Postal Service from publishing such regulations. \*/ Such procedure is provided by FTC regulations to establish compliance with an FTC order, whether the order be by consent or is the product of litigation. It is this distinction that renders inapplicable to the

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\*/ For reasons best known to itself, the Postal Service does provide pre-publication review of advertising to establish whether a promotion constitutes a lottery. But, the Postal Service steadfastly refuses to review advertising to determine compliance with a compromise agreement.

case the FTC cases cited by appellees in their brief. Appellant's argument for a strict standard of construction does not run contrary to the purpose of the statute (appellees' brief, pg. 15). That purpose is served by the proceedings which give rise to the Compromise Agreement in the first place. However, in the absence of an opportunity for administrative review to determine compliance, a strict standard of construction of compromise agreements is essential in terms of the severe remedy of stopping all mail upon a finding of a breach such as was done herein. Otherwise a party, such as appellant in the instant case, finds itself confronted with the argument found at the foot of page 17 of appellees' brief that it should not have waived its right to a hearing if it wished to prove the validity of its cosmetic claims - even though the only claims appellant thought it was waiving a hearing on were those that had been alleged in paragraphs 3(a) and 3(b) of the administrative complaint.

#### CONCLUSION

For the foregoing reasons and those set forth in plaintiff-appellant's principal brief, it is respectfully

submitted that the order of the District Court herein should be reversed and defendants-appellees enjoined from enforcing the mail stop order issued against appellant's new advertisement.

Respectfully submitted,



BASS & ULLMAN

Attorneys for Plaintiff-Appellant



U.S. COURT OF APPEALS:SECOND CIRCUIT

AMERICAN IMAGE CORP.,  
Plaintiff-Appellant,

against

U.S. POSTAL SERVICE, et al,  
Defendants-Appellees.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, James Steele, being duly sworn,  
deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York  
That on the 14th day of August 1974 at Foley Sq., New York

deponent served the annexed Reply Brief upon

Paul J. Curran-U.S. Attorney for the Southern Dist.-Attorney for Appellee

the in this action by delivering <sup>2</sup> true copy thereof to said individual  
personally. Deponent knew the person so served to be the person mentioned and described in said  
papers as the Attorney(s) herein,

Sworn to before me, this 14th  
day of August 1974

*James Steele*

Print name beneath signature

JAMES STEELE

ROBERT T. BRIN  
NOTARY PUBLIC, STATE OF NEW YORK  
NO. 31 - 0418950  
QUALIFIED IN NEW YORK COUNTY  
COMMISSION EXPIRES MARCH 30, 1975

*Robert T. Brin*